

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 25, 2007 Session

**ROBERT FRANCIS HIBBARD, JR., v. RECEIVABLES MANAGEMENT
BUREAU, INC., d/b/a R.M.B. CHECK SERVICES**

**Direct Appeal from the Circuit Court for Knox County
No. 1-115-06 Hon. Dale C. Workman, Circuit Judge**

No. E2007-00152-COA-R3-CV - FILED NOVEMBER 20, 2007

The Trial Court dismissed plaintiff's malicious prosecution action. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Anthony M. Avery, Knoxville, Tennessee, for appellant.

John M. Lawhorn, Tennessee, for appellee.

OPINION

Plaintiff, Robert Francis Hibbard, Jr., filed this action against defendant, alleging that defendant had sworn out a warrant for "Robert Hibbard (alias)" for a worthless check. Plaintiff alleged that on October 15, 2005, he was involved in an argument at West Town Mall, the police intervened and when they checked for outstanding warrants against him, the warrant taken out by defendant was discovered. Further, that he was incarcerated for four days, and that he missed work as a result.

Plaintiff further asserts that he appeared on three different occasions for a hearing on this matter, and that no witnesses for the defendant appeared. Finally, the charges were dismissed on his Motion, at the third hearing. A copy of the warrant was attached to the Complaint.

Defendant's Answer asserted that plaintiff's Complaint failed to state a cause of action upon which relief could be granted, admitted swearing out the subject warrant, but denied that any notice of the hearings was received. Defendant further denied the remaining allegations of the Complaint, and in its Amended Answer asserted that the warrant actually pertained to plaintiff's father, Robert Hibbard, and the State had erroneously instigated criminal proceedings against plaintiff.

Subsequently, defendant filed a Motion for Summary Judgment, and a Statement of Material Facts, stating that on September 17, September 17, 2003, Christy McDaniel, an employee of defendant, filed a Criminal Complaint against "Robert Hibbard (alias)" in the Sessions Court because Robert Hibbard issued a worthless check to a client of defendant (Butler & Bailey Grocery) for \$41.35. Defendant stated that the Judicial Commissioner issued a warrant for the arrest of "Robert Hibbard" for the offense. Defendant stated plaintiff was detained by police officers two years later, and upon presenting ID to one of the officers, was arrested on the basis of the outstanding warrant. Defendant stated that plaintiff appeared in court on three different occasions for trial on the worthless check charge, and while subpoenas were issued for Christy McDaniel, she did not receive them (likely because their office had moved).

Defendant stated that plaintiff was Robert Hibbard, Jr., and that his father's name was Robert Hibbard, Sr., and that the worthless check was not drawn on an account belonging to plaintiff, and did not contain his signature. It stated that the signature was actually that of Robert Hibbard, Sr., and that Ms. McDaniel's intent was only to initiate charges against the Robert Hibbard who wrote the worthless check. The summary judgment asserted that it had negated all of the essential elements of plaintiff's cause of action, and stated that it never commenced a criminal proceeding against plaintiff, that the criminal proceeding in questions did not result in a favorable termination for plaintiff, and the defendant did not act without probable cause, nor with malicious intent. Attached to the Motion was the affidavit and warrant, along with the affidavit of Christy McDaniel wherein she stated she had worked for defendant since 1996, and that defendant did collections for commercial clients, including past due accounts and worthless checks. She stated that in April 2003, defendant was notified by a client, Butler & Bailey Grocery, that it had a worthless check received from Robert Hibbard. McDaniel further stated that the defendant made several efforts to collect the check, all to no avail, and eventually prepared the subject Affidavit of Complaint for the purpose of instituting criminal proceedings against Robert Hibbard.

McDaniel stated that her intent was to institute charges against the Robert Hibbard who passed the worthless check, and not against plaintiff. McDaniel stated that if she had intended to pursue charges against plaintiff, she would have included the suffix "Jr." on the Affidavit. Further, that she never received any subpoenas or other communication from the court regarding the hearing dates for plaintiff and that she had recently examined copies of the subpoenas, and said they were mailed to an incorrect address. Further that Leonard Butler was not an agent of defendant, but rather, was an agent of defendant's client, Butler & Bailey Grocery. The subpoenas were attached to her Affidavit, along with the discovery responses received from plaintiff, which stated that his father's name was Robert Hibbard, Sr., and that the check in question was probably drawn by plaintiff's father. A copy of the check was likewise attached.

Plaintiff filed a Response, and took issue with certain facts stated in the Statement of Material Facts, to the effect that he was arrested on October 15, 2005, and incarcerated for four days, that there were three hearings on the matter, and no witnesses for the prosecution appeared. Further, he stated that he did not write or sign the check in issue.

The Trial Court, responding to the Motion for Summary Judgment, entered an Order of Dismissal pursuant to Tenn. R. Civ. P. 56, and found there was no genuine issue of material fact, and defendant was entitled to judgment as a matter of law. Plaintiff has appealed, raising the issue of whether summary judgment was appropriate.

Plaintiff argues the Trial Court erred in granting summary judgment, when the witnesses for defendant did not show up (despite the issuance of subpoenas) resulting in a dismissal for failure to prosecute, which plaintiff claims was the most favorable termination of those proceedings that he could get. Defendant argues that plaintiff failed to establish the necessary elements of a malicious prosecution claim, and thus summary judgment was appropriate.

Both parties agree that in order to establish a claim for malicious prosecution, it has to be shown that there was a prior criminal proceeding brought by the defendant against the plaintiff which terminated in the plaintiff's favor, and that the proceeding was brought without probable cause, and that it was instigated with malice. *Landers v. Kroger Co.*, 539 S.W.2d 130 (Tenn. Ct. App. 1976).

Defendant asserts that plaintiff cannot make out a *prima facie* case of malicious prosecution, as there was no proof that defendant instituted a criminal proceeding against plaintiff. Defendant swore out a warrant on a bad check written by "Robert Hibbard" with no Sr. or Jr. suffix. The Affidavit filled out by defendant's employee simply states that a worthless check was written by "Robert Hibbard (alias)" and lists the address shown on the face of the check. Plaintiff admits that he is Robert Francis Hibbard, Jr., and that his father is Robert Francis Hibbard, Sr. Plaintiff admits that he did not write the check, and that it was not drawn on his bank account, but rather it was written by his father. The employee of defendant who swore out the warrant, stated that her only intent was to institute criminal proceedings against the Robert Hibbard who signed the worthless check. Further, that she never intended to pursue any criminal charges against plaintiff, and that if she had intended to do so, she would have listed the suffix "Jr." on the affidavit.

Plaintiff has produced no proof that any agent of defendant had any reason to know that there was a Robert Hibbard, Jr. (or that the maker of the check was Sr., since this is not listed on the check). As such, there is no proof that defendant instituted a criminal proceeding against plaintiff.

Moreover, there is no proof that the warrant was instituted without probable cause, or with malice. The elements of probable cause are that the charging party must have honestly believed the accused was guilty of the crime charged, and this belief must have been reasonable, "based on facts and circumstances sufficient to lead an ordinary prudent person to believe the

accused was guilty of the crime charged.” *Kerney v. Aetna Casualty and Surety Co.*, 648 S.W.2d 247, 251 (Tenn. Ct. App. 1982). In this case, it is clear that defendant had reason to believe that “Robert Hibbard” had written the check that was dishonored, because it was signed by “Robert Hibbard”. Defendant filed the warrant against this person, rather than the plaintiff, and acted with probable cause against the named defendant.

Likewise, plaintiff cannot show that the bad check prosecution was instituted against him with malice, for the above stated reasons. Unfortunately, plaintiff was mistakenly arrested on a warrant issued to his father, and the fault does not lie with defendant.

For the foregoing reasons, we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to the plaintiff, Robert Francis Hibbard, Jr.

HERSCHEL PICKENS FRANKS, P.J.